MEMORANDUM ON THE ABILITY AND LIKELIHOOD OF A BANKRUPTCY COURT DECIDING (1) THE CONSTITUTIONALITY OF SOUTH CAROLINA STATUTES, AND (2) RATES SCE&G MAY CHARGE TO ITS RATE PAYERS

This memorandum addresses two issues: (1) the jurisdiction of a Bankruptcy Court to decide certain issues of the constitutionality, enforceability and scope of South Carolina statutory provisions, and (2) the jurisdiction of the Bankruptcy Court to supersede the State agency charged with setting utility rates. The discussion below does not undertake to examine in detail all possible issues, all possible arguments that may be made and all positions that may be taken by the parties, if a bankruptcy were filed. Instead, the discussion below is intended to provide a general understanding of bankruptcy jurisdiction as relates to these two issues, for use in assessing matters at this stage of the still developing situation.

OVERVIEW

Questions have been raised regarding the ability and the likelihood of a Bankruptcy Court ruling on the constitutionality of state legislation in the event that SCANA and/or South Carolina Electric & Gas Company ("SCE&G") were to file for relief under the United States Bankruptcy Code (11 U.S.C. § 101, *et seq.*, the "Bankruptcy Code"), or be placed involuntarily into a case under the Bankruptcy Code. The questions stem from the abandonment of the project for the construction of two AP1000 nuclear reactors (the "Project") at the Virgil C. Summer Nuclear Plant (the "V.C. Summer Plant") by SCE&G and the South Carolina Public Service Authority ("Santee Cooper"), the co-owners of the V.C. Summer Plant. The questions center on SCE&G's recovery of costs from its rate payers. SCE&G is recovering expenses it incurred in the Project from the rate payers it serves under S.C. Code § 58-33-270(E) of the Base Load Review Act (the "BLRA"), enacted by the South Carolina Legislature in 2007, by and through a charge added to SCE&G's invoices to each rate payer. This right of recovery is likely to be challenged.

The challenges to SCE&G's right of recovery may include issues of the constitutionality of South Carolina statutes. If SCE&G's right to collect the recovery from rate payers under the BLRA were challenged by an attack on the constitutionality of the BLRA provisions, or if the South Carolina Legislature enacted new legislation rescinding or modifying provisions of the BLRA, would the Bankruptcy Court be able, and inclined, to rule on the constitutionality of the legislation?

In a related vein, the question also has been raised of whether the Bankruptcy Court would be able to set rates to be charged by SCE&G to its rate payers. Would the Bankruptcy Court have the authority to set the rates?

As discussed below, the answers to the first set of questions is "probably" (as to ability) and "uncertain" (as to likelihood), while the answer to the second question (on setting rates) is "no."

DISCUSSION

A. The Ability of a Bankruptcy Court to Decide, and the Likelihood that It Would Decide, the Constitutionality of a South Carolina Statute

1. Bankruptcy Jurisdiction Generally

The jurisdiction of the Bankruptcy Court is broad with regard to addressing issues necessary to give effect to the provisions of the Bankruptcy Code. "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). Pursuant to 28 U.S.C. § 1334(a), the United States District Court has original and exclusive jurisdiction of all cases under title 11 of the United States Code of Laws (the Bankruptcy Code), and pursuant to 28 U.S.C. § 1334(b), the District Court has "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Pursuant to 28 U.S.C. § 157(a) and local rules of the District Court (Local Civil Rule 83.IX.01 in the U.S. District Court for the District of South Carolina), bankruptcy cases and matters are automatically referred to the Bankruptcy Court.

The language in § 1334(b) providing jurisdiction of civil proceedings arising under the Bankruptcy Code, **or arising in or related to cases under the Bankruptcy Code**, has served to provide the basis for Bankruptcy Court rulings on myriad issues. Certain matters are defined as "core proceedings" essential to the bankruptcy process, as set forth in 28 U.S.C. § 157(b)(2), over which the Bankruptcy Court should have jurisdiction; however, the Bankruptcy Court may also decide non-core matters if they are within the scope of § 1334(b).

There are limitations on what matters the Bankruptcy Court can decide by entry of a final order or judgment, because the Bankruptcy Court is an Article I court under the U.S. Constitution, not an Article III court like the District Court. Some matters can be heard only by an Article III court unless the parties consent to a final adjudication by an Article I court. In this regard, the Bankruptcy Court can enter final judgments on some state law claims raised in the bankruptcy only if the parties consent. *See Stern v. Marshall,* 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011); and *Wellness International Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015). If the parties do not consent to the Bankruptcy Court adjudicating the matter, the Bankruptcy Court may hear the matter and submit proposed findings and conclusions to the District Court, under § 157(c)(1), or the reference of the matter, or the entire case, may be withdrawn from the Bankruptcy Court for adjudication by the District Court under § 157(d).

If SCE&G were to file a bankruptcy case, issues of the constitutionality of the BLRA or legislation rescinding or modifying the BLRA could be deemed to arise in or related to the bankruptcy case, with the Bankruptcy Court having jurisdiction pursuant to § 1334(b) and § 157(a).

2. Bankruptcy Court Adjudication of Constitutionality of South Carolina Statutes

In regard to the ability of the Bankruptcy Court to decide the constitutionality of South Carolina statutes, such as the BLRA or new legislation rescinding or modifying the BLRA, there

is authority supporting the Bankruptcy Court's ability to make such a decision. *See, e.g., In re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich. 2013)(authority to rule on the constitutionality of a state statute in determining the eligibility of the City of Detroit to file for relief under Chapter 9 of the Bankruptcy Code); *In re City of Harrisburg, PA*, 465 B.R. 744 (Bankr. M.D.Pa. 2011)(state statute barring third class cities from filing for bankruptcy relief did not violate the state constitution); and *South Bay Expressway, L.P. v. County of San Diego (In re South Bay Expressway, L.P.)*, 455 B.R. 732 (Bankr. S.D.Cal. 2011)(state statute reclassifying private property interest to public property, for tax exemption, violated state constitution). Indeed, in citing support for the Bankruptcy Court to rule on the statutes, one could note that Bankruptcy Courts have made a number of rulings on state statutes regarding exemptions applicable to debtors in bankruptcy. *See, e.g., In re Butcher,* 189 B.R. 357 (Bankr. D.Md. 1995); *In re Hughes*, 244 B.R. 805 (Bankr. D.S.D. 1999); and *In re Williams*, 93 B.R. 181 (Bankr. E.D.Ark. 1988). The question is whether the issue is necessary or important to a determination of bankruptcy matters, such as the ability of a debtor to reorganize.

In a bankruptcy by SCE&G, issues of the constitutionality of the BLRA, or of legislation rescinding or modifying provisions of the BLRA, could be deemed to be essential for a reorganization by SCE&G, and/or for the determination of the rights of SCE&G and its creditors in regard to bankruptcy matters. The Bankruptcy Court could determine that it should decide such issues as a necessary or important part of the bankruptcy proceedings. Furthermore, the Bankruptcy Court could find that certain provisions of the Bankruptcy Code preempt the state statutes.

However, strong arguments may be made that the Bankruptcy Court should not decide the issues of the constitutionality of the South Carolina statutes, on the grounds of lack of proper jurisdiction, federalism and comity. The Bankruptcy Court could abstain from ruling on the issues, under § 1334(c), or certify the issues to the South Carolina Supreme Court for determination.

In regard to the likelihood that the Bankruptcy Court would elect to decide issues of the constitutionality of the BLRA and any legislation rescinding or modifying provisions of the BLRA, the election to decide the issues would probably hinge on factors such as the necessity and importance of the constitutionality ruling for bankruptcy matters, the projected time needed for a state court decision on the issues, and the importance of expediency in the determination of the issues. The South Carolina Bankruptcy Court would not want to usurp the role of South Carolina courts in deciding the validity and efficacy of the statutes under the South Carolina Constitution; however, the Bankruptcy Court might conclude that it was obliged to decide the issues in connection with matters in the bankruptcy case.

B. Rates Charged to SCE&G Rate Payers

The Bankruptcy Court cannot set and impose rates to be charged to the rate payers served by SCE&G. The establishment of rates under South Carolina law is not preempted by the Bankruptcy Code. It is within the police and regulatory powers of the State of South Carolina.

The possible exception to this limitation would be in a situation in which the parties who would be involved in setting rates chargeable to rate payers under state law, *i.e.*, the Public Service Commission, the Office of Regulatory Staff, and others, agreed to entry of an order in the

bankruptcy case which included rates to be used. In theory, such a consent order could be entered in connection with other issues, such as the resolution of claims against SCE&G for repayment of costs previously charged to rate payers. However, such a consent order could be entered only if all constituencies entitled to be heard in the rate setting process under state law were allowed an opportunity to be heard in the bankruptcy matter. Most likely, the Bankruptcy Court would not want to become involved in setting rates.

Julio E. Mendoza, Jr.
NEXSEN PRUET, LLC
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